No. 86-672

Supreme Court, U.S.
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OCT 23 1986
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

RAMON ELISALDE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS C. WALSH
DENNIS C. DONNELLY
LARRY M. BAUER
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600
Attorneys for Petitioner

BRYAN, CAVE, MCPHEETERS & MCROBERTS
Of Counsel

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Must a duty of fair representation action be filed and served within the six-month limitation period contained in 29 U.S.C. §160(b)?

2. Should this case be disposed of in accordance with the Court's eventual ruling in *West v. Conrail, Inc.*, No. 85-1804 (certiorari granted), which presents the same issue?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	5

Appendix:

A - Opinion of U.S. Court of Appeals, Case No. 85-2025, Elisalde v. International Association of Machinists, etc., et al., dated May 30, 1986	A-1
B - Opinion of U.S. Court of Appeals, Case No. 85-1830, Thomsen v. United Parcel Service, Inc., et al., dated May 30, 1986	A-4
C - Opinion of U.S. District Court, Case No. 84-2918, Elisalde v. International Assciation of Machinists, etc., et al., dated June 13, 1985	A-12
D - Order of U.S. District Court, Case No. 84-2918, Elisalde v. International Association of Machinists, etc., et al., dated July 23, 1985	A-15

TABLE OF AUTHORITIES

Cases Cited

	Page
Continental Baking Co., Inc. v. Macon, No. 85-1400	4
Del Costello v. Teamsters, 462 U.S. 151 (1983)	3, 4
Gallon v. Levin Metals Corp., No. 85-1839	4
Hunt v. Missouri Pacific Railway Co., 729 F.2d 578 (8th Cir. 1984)	4
Thomsen v. United Parcel Service, Inc., 792 F.2d 115 (8th Cir. 1986)	2, 3
United Independent Flight Officers v. United Airlines, Inc., 756 F.2d 1262 (7th Cir. 1985)	4
West v. Conrail, Inc., No. 85-1804	4, 5

Statutes and Regulations Cited

28 U.S.C. §1254(1)	2
29 U.S.C. §160(b)	2
National Labor Relations Act, §10(b)	2, 3, 4

Other Citations

Federal Rule of Civil Procedure 4	3

No.

IN THE

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OCTOBER TERM, 1986

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

RAMON ELISALDE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Trans World Airlines, Inc., defendant in the action below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed May 30, 1986.[1]

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals, filed on May 30, 1986, are reproduced in Appendix A and reported at 792 F.2d 114. The opinions of the Eighth Circuit in

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[1] Petitioner Trans World Airlines, Inc., has no parent corporation, subsidiaries (other than wholly-owned subsidiaries) or affiliated corporations, within the meaning of Rule 28.1 of this Court.

the companion case of *Thomsen v. United Parcel Service, Inc.*, are reproduced in Appendix B and reported at 792 F.2d 115. The Memorandum and Order of the United States District Court for the Eastern District of Missouri dated June 13, 1985, is reproduced in Appendix C, and the Order of that court dismissing the complaint as to Petitioner is reproduced in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1986, and a timely petition for rehearing was denied on August 7, 1986, three judges dissenting. A copy of the order denying rehearing is reproduced in Appendix E. This petition was filed within 90 days of August 7, 1986. The jurisdiction of this Court is founded upon 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves the claim of breach of duty of fair representation and presents the issue of whether such claims are controlled by the filing and service requirements of §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), which states in pertinent part:

> "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made."

STATEMENT OF THE CASE

Respondent was employed by Petitioner Trans World Airlines, Inc. ("TWA") and was represented by the International Association of Machinists, District Lodge No. 142 ("the Union"), which was also named a defendant below. Respondent was discharged by TWA on February 19, 1984. He filed a

grievance contesting his discharge, which the Union chose not to arbitrate. On June 20, 1984, respondent was informed of the Union's refusal to process his case further. On December 18, 1984, he filed this action in the district court alleging that the Union had violated its duty of fair representation and that TWA had breached the collective bargaining agreement.

TWA was served with process pursuant to Rule 4, Fed. R. Civ. P., on January 4, 1985, approximately 15 days after the six-month period prescribed by §10(b) had expired. Personal service was effected on the Union on February 28, 1985.

The district court, in response to separate motions for summary judgment filed by TWA and the Union, dismissed plaintiff's action as time barred because neither defendant was served within the six-month limitation period prescribed by §10(b). A divided Court of Appeals reversed the district court, relying heavily on its contemporaneously filed opinion in *Thomsen v. United Parcel Service, Inc.*, 792 F.2d 115, and holding that the mere filing of a complaint within six months of the accrual of the cause of action was sufficient to toll the statute of limitations. The court acknowledged a split among the Circuits on this question.

Senior District Judge Hanson, sitting by designation, dissented in both cases. He argued that this Court's opinion in *Del Costello v. Teamsters*, 462 U.S. 151 (1983) had determined this issue and noted that §10(b) contained an "unambiguous requirement . . . that filing *and* service be accomplished within six months of the accrual of the action . . ."

Timely petitions for rehearing were denied by a 6-3 vote of the active Circuit Judges.

REASONS FOR GRANTING THE WRIT

In *Del Costello v. Teamsters, supra,* the Court resolved a long-simmering dispute and held definitively that duty of fair representation cases were akin to unfair labor practice charges and thus were subject to the six-month statute of limitations of §10(b) both as to the employer and the union. 462 U.S. at 155.[2] Since §10(b) specifically contains both a filing and a service requirement, the Court's adoption of the statute in its entirety clearly constituted an endorsement of the service requirement as well as the filing mandate.

Certain Courts of Appeals, however, apparently felt uncomfortable with that result, and the issue concerning the service requirement soon created a split among the Circuits. This Court has accepted for review this very issue in *West v. Conrail, Inc.,* No. 85-1804, which has been briefed and is awaiting oral argument. The same question is also presented in *Gallon v. Levin Metals Corp.,* No. 85-1839, and *Continental Baking Co., Inc. v. Macon,* No. 85-1400, in which petitions for certiorari are pending.

The opinion of the Eighth Circuit in this case is a minority view that is contrary to *Del Costello* and to the uniformity sought to be achieved by that decision. The Court of Appeals' concerns about the supposed inadequacy of time to effect service ignore the plaintiff's ability to arrange for personal service at the outset of the case and, in any event, are no more valid in this context than in any other case involving a six month (or shorter) limitation period.

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[2] While *Del Costello* was a Section 301 case under the National Labor Relations Act, the same considerations admittedly apply to the instant action, which was brought under the Railway Labor Act. *United Independent Flight Officers v. United Airlines, Inc.,* 756 F.2d 1262 (7th Cir. 1985); *Hunt v. Missouri Pacific Railway Co.,* 729 F.2d 578 (8th Cir. 1984).

Since this petition presents the identical issue as *West* and since the issues have been fully ventilated by both sides in that case, we respectfully suggest that, in the interest of judicial economy, this petition should be held on the docket and disposed of in accordance with the eventual ruling in *West*.

CONCLUSION

For the reasons stated, the writ of certiorari should be granted; alternatively, consideration of the petition should be deferred pending disposition of *West v. Conrail,* No. 85-1804, following which certiorari should be granted, the judgment of the Eighth Circuit vacated, and the cause remanded to that court for reconsideration in light of *West*.

Respectfully submitted,

THOMAS C. WALSH
DENNIS C. DONNELLY
LARRY M. BAUER
500 North Broadway
St. Louis Missouri 63102
(314) 231-8600

Attorneys for Petitioner

BRYAN, CAVE, McPHEETERS & McROBERTS
Of Counsel

October 22, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2025

Ramon Elisalde,
Appellant,

v.

International Association of Machinists,
District Lodge No. 142, a Labor Organization
and Trans World Airlines, Inc., a Delaware
Corporation,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: February 13, 1986

Filed: May 30, 1986

Before HEANEY and BOWMAN, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

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*The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

Ramon Elisalde appeals from a district court order granting the International Association of Machinists, District Lodge No. 142's (Union) motion to dismiss for untimeliness.

Trans World Airlines, Inc. (TWA) discharged Elisalde from his position as ramp tender on February 9, 1984. Although the Union intiated grievance proceedings on his behalf, on June 20, 1980, it informed him that it would not continue to arbitrate his grievance. Elisalde filed an action in district court on December 18, 1984, claiming that TWA had breached the collective bargaining agreement in violation of section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and that the Union had breached its duty of fair representation in violation of the National Labor Relations Act. Elisalde attempted to serve TWA and the Union by mail pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii) on December 20, 1984. TWA did not acknowledge receipt of the summons until January 4, 1985. The Union refused to acknowledge service, forcing Elisalde to initiate personal service, which was not effected until February 28, 1985. On the Union's motion, the district court dismissed Elisalde's complaint, stating that since service was not effected on TWA or the Union within six months of the accrual of the cause of action, section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), barred the action as untimely.

Although the Supreme Court, in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), borrowed section 10(b)'s six-month statute of limitations for hybrid section 301/fair representation actions, the limitations period is tolled by the filing of the complaint. *Thomsen v. United Parcel Service, Inc., Local 710, International Brotherhood of Teamsters,* No. 85-1830 (8th Cir. filed May 30, 1986). Since Elisalde filed his complaint within the six-month limitations period, his complaint was timely. Accordingly, we reverse the district court's order and remand for a consideration on the merits.

HANSON, Senior District Judge, dissenting.

For the reasons I stated in *Thomsen,* I must dissent in this case as well.

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1830

Jack Thomsen,
Appellee,

vs.

United Parcel Service, Inc.,
Local 710, International
Brotherhood of Teamsters,
Appellant,

Appeal from the United States District Court
for the Southern District of Iowa.

Submitted: February 13, 1986

Filed: May 30, 1986

Before HEANEY and BOWMAN, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

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*The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

Local 710, International Brotherhood of Teamsters (Union) appeals from a district court order denying its motion for summary judgment.

I. BACKGROUND

On December 16, 1983, United Parcel Service (UPS) discharged Jack Thomsen. On January 19, 1984, Thomsen filed a grievance protesting his discharge with a joint Union/UPS committee, which, after a hearing, upheld the discharge. Thomsen filed a complaint in district court on June 18, 1984, claiming that UPS had discharged him in violation of the collective bargaining agreement and section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and that the Union had breached its duty of fair representation in the ensuing grievance proceedings in violation of the National Labor Relations Act.

The Union sought dismissal of the action on the ground that it was barred under section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b),[1] which requires that a fair representation action be filed and served within six months of the accrual of the cause of action. Although Thomsen had filed his action within the six-month limit, he had not effectively served the defendants until August 1, 1984, after six months had

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[1] 29 U.S.C. § 160(b) provides in pertinent part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board * * *, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

elapsed.[2] On May 15, 1985, the district court denied the Union's motion, finding that the six-month statute of limitations had been tolled at the time of filing, and that the action was therefore timely. It then certified the matter to this Court pursuant to 28 U.S.C. § 1292(b).

II. DISCUSSION

Although there is no statute of limitations expressly applicable to hybrid section 301/fair representation cases, in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), the Supreme Court found that section 10(b) of the National Labor Relations Act was "designed to accommodate a balance of interests very similar to that at stake here," *id.* at 169, and "borrowed" section 10(b)'s statute of limitations for the hybrid actions. The question remains, however, whether section 10(b)'s six-month service requirement is also applicable to the hybrid cases.

We recognize that this issue has produced a split among several of the Circuits of the United States Courts of Appeals. The district court found that, in a hybrid section 301/fair representation complaint, the six-month statute of limitations is tolled by the filing of the complaint, and the plaintiff need not effect service within six months of the accrual of the cause of action. Subsequent to the district court's decision, the Sixth Circuit adopted the same approach,[3] also finding it consistent with

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[2] Thomsen, proceeding pro se, failed in his initial attempts to serve UPS and the Union. The defendants apparently were able to quash the summonses on the bases of improper delivery, delivery to persons unable to accept service, the naming of the wrong Union official, and omission of certain information. Thomsen then obtained counsel, who properly served defendants.

[3] This approach is similar to that taken by federal courts in section 1983 actions, where limitation periods are borrowed from state statutes. *Macon v. ITT Continental Baking Co.,* 779 F.2d 1166, 1171-72 (6th Cir. 1985).

DelCostello. *See Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985). Although there is also support for the Union's argument that, under *DelCostello*, the limitations period in these hybrid actions is not tolled until the complaint has been both filed and served, *see Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986); *West v. Conrail, a Foreign Corp.*, 780 F.2d 361 (3d Cir. 1985); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984), we are persuaded that the resolution of this issue by the district court is more consistent with the policies of federal labor law and the practicalities of this type of litigation.

The *DelCostello* Court focused on the fact that section 10(b) established a "6-month period for making charges of unfair labor practices to the NLRB," *see id.*, and did not address the service question. There was, however, no need for it to do so. The Court made it very clear that it was borrowing the limitations period from section 10(b) to fill a gap in federal law. There is no gap in federal law in regard to service requirements. As the district court stated, "[i]n federal suits to enforce federal rights, the general rule is that limitation periods are tolled by the filing of a complaint. *See* Fed. R. Civ. P. 3." In *Moore Co. v. Sid Richardson Carbon & Gasoline Co.*, 347 F.2d 921 (8th Cir. 1965), *cert. denied*, 383 U.S. 925, *reh'g denied*, 384 U.S. 914 (1966), this Court held that

> in a case such as this, based upon federal law and controlled by federal statute of limitation, * * * the commencement of the action in and of itself is sufficient to toll the statute. Federal Rule of Civil Procedure 3 reads: "A civil action is commenced by filing a complaint with the court." Such rule in our view unmistakedly states in plain, clear,

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> While state law controls the time within which an action must be begun, the manner in which an action is commenced and when it is deemed to have begun, are governed by the law of the forum. These matters are procedural and not substantive.

Id. at 1172 (quoting *Mohler v. Miller*, 235 F.2d 153, 155 (6th Cir. 1956)).

well-understood and unambiguous language that an action is commenced by filing the complaint. The rule sets forth no additional requirements or conditions. The history of the promulgation of the rule is set out by Judge Medina in Messenger v. United States. As there shown, suggestions were made that the action abate if jurisdiction by service of process was not obtained within sixty days. Judge Medina in viewing the history of the rule, states:

"In the end, however, no time was specified for the service of process, the Advisory Committee noting that the motion sanctioned by Rule 41(b) provided 'a method available to attack unreasonable delay in prosecuting an action after it has been commenced.' See Report of the Advisory Committee Containing Proposed Rules of Civil Procedure, p. 4 (April, 1937)."

It appears to us that Rule 41(b) provides adequate protection against unreasonable delay in serving process or in prosecuting the suit.

Moore Co., 347 F.2d at 922-23 (citations omitted).

The Sixth Circuit emphasized that

[t]he tolling provision of section 10(b) was designed for administrative proceedings and is inappropriate in the federal judicial context. Indeed, it has long been recognized that Congress created the administrative courts system with quite different concerns from those which necessarily governed Article III courts. The service requirement of section 10(b) is necessary in NLRB proceedings because without it there would be no rule at all. In the federal courts, however, Fed. R. Civ. P. 4(a) orders the clerk of court to "forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint," and Fed. R. Civ. P. 4(j) requires such service to be made within 120 days.

Macon, 779 F.2d at 1171 (citations omitted).

Besides being totally unnecessary, the use of section 10(b)'s service requirement in the federal courts would cause confusion. *Id.* In fact, the Advisory Committee on Rules intended Rule 4(a) to avoid just such interpretation questions as have arisen here.

> When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirements of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

Fed. R. Civ. P. 4(a) advisory committee note.

The desirability of uniformity in the application of the Federal Rules of Civil Procedure provides a persuasive argument for rejecting the application of section 10(b)'s service requirement in these judicial actions.

Although there was no need for the *DelCostello* Court to consider the service question, we are convinced that, had it done so, it would have rejected the requirement. One of the Court's main concerns had been that the plaintiff be provided "with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *See DelCostello,* 462 U.S. at 166. It emphasized that

> [i]n the labor setting, * * * the employee will often be unsophisticated in collective-bargaining matters, and he will

> almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit.

Id., at 165-66.

According to the Federal Rules of Civil Procedure, service is considered "prompt" if made within 120 days of the filing of the complaint. Simple arithmetic demonstrates that, in order to have a reasonable amount of time to make prompt service and still meet the six-month (approximately 180 days) service requirement, the plaintiff would have to file the complaint within sixty days of the accrual of the cause of action. The Supreme Court could not have intended this result, as, in *DelCostello,* it determined that a ninety-day filing requirement did not provide plaintiffs with sufficient opportunity to vindicate their rights. *See DelCostello,* 462 U.S. at 166. The Supreme Court would not have "borrowed" a service requirement which would have denied the Rule 4(j) 120-day grace period to those very plaintiffs it sought to protect from harsh filing deadlines.

Accordingly, we affirm the order of the district court.

HANSON, Senior District Judge, dissenting.

Although the majority opinion arrives at an eminently sensible analysis of the application of section 10(b)'s service requirement, I do not believe that *DelCostello* leaves us room to so speculate. It is apparent to me that the Supreme Court recognized the unambiguous requirement in section 10(b) that filing *and* service be accomplished within six months of the accrual of the action by its specific reference to this language in the statute. *DelCostello v. Teamsters,* 452 U.S. 151, 154 n.2 (1983). To construe otherwise places this Court in the untenable position of legislating what is the appropriate policy in this area.

I must therefore respectfully dissent in this case and in *Ramon Elisalde v. International Association of Machinists, et al.*, No. 85-2025 (8th Cir. filed May 30, 1986).

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 84-2918 C (5)

Ramon Elisalde,
Plaintiff,

vs.

International Association of Machinists,
District Lodge No. 142 and Trans World
Airlines, Inc.,
Defendants.

MEMORANDUM AND ORDER

(Filed June 13, 1985)

This matter is before the Court on defendant International Association of Machinists' motion to dismiss for untimeliness. Plaintiff has filed a responsive affidavit, to which defendant International Association of Machinists filed a reply.

Plaintiff has filed a hybrid-§301 case (breach of contract by employer/breach of duty of fair representation by union) against defendants International Association of Machinists and Trans World Airlines. The plaintiff's discharge was confirmed on June 20, 1984 and plaintiff filed his complaint on December 18, 1984. Plaintiff attempted to serve defendant International Association of Machinists by mail, pursuant to Rule 4(c)(2)(C)(ii), Federal Rules of Civil Procedure, on December 20, 1984. Defendant International Association of Machinists notified plaintiff on December 21, 1984 that it would not acknowledge service and therefore to initiate personal service. Personal service was not had on defendant International Association of Machinists until February 28, 1985.

Defendant asserts that plaintiff's complaint is time-barred because defendant was not served within the applicable six months statute of limitations. Plaintiff contends that defendant was timely served by mail delivery and that defendant refused to accept service intentionally to force personal service by plaintiff.

It is well-settled that the six months statute of limitations set forth in Section 10(b) of the National Labor Relations Act (NLRA), 29 USC §160(b) applies to hybrid §301 cases such as the present one. *Delcostello v. Teamsters,* ____ U.S. ____, 103 S.Ct. 2281 (1983); *C.L. Craft v. Automotive, Petroleum and Allied Industries Employees Union, Local 618, et al.,* ____ F.2d ____ (8th C 1985); *Rodman, et al. v. Hensley, et al.,* 740 F.2d 665 (8th C 1984); *Hunt v. Mo.Pac. Railroad,* 729 F.2d 578 (8th C 1984).

Plaintiff agrees that the six-month period is applicable, but interprets service upon defendant to be at time of mail delivery. Plaintiff misconstrues Rule 4, Federal Rules of Civil Procedure. Rule 4 clearly indicates that upon receipt of process a potential defendant has twenty days in which to accept and acknowledge service, otherwise plaintiff must procure personal service upon the potential defendant. Only upon acknowledgement of mail service or receipt of personal service, is defendant properly served.

Defendant International Association of Machinists had the right to refuse service by mail and even if defendant did not initially refuse mail service, defendant still had twenty days to accept service, which would have still been outside the allotted time period. Thus, the Court finds plaintiff's complaint to be time-barred. Accordingly,

IT IS HEREBY ORDERED that defendant International Association of Machinists' motion to dismiss plaintiff's complaint for untimeliness be and is **GRANTED.** and said complaint is **DISMISSED.** Each party is to be assessed their own costs.

Dated this 13th day of June, 1985.

Stephen N. Limbaugh
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 84-2918 C (5)

Ramon Elisalde,
Plaintiff,

vs.

International Association of Machinists, et al.,
Defendants.

ORDER

(Filed July 23, 1985)

IT IS HEREBY ORDERED that defendant TWA's motion to dismiss be and is **GRANTED.** As outlined by this Court's order of June 13, 1985, plaintiff failed to timely serve both defendants as required in a hybrid §301 cause of action.

IT IS FURTHER ORDERED that plaintiff's motion for reconsideration be and is **DENIED.** Plaintiff has failed to file his complaint and serve both defendants within the statutory six months time limitation.

Dated this 23rd day of July, 1985.

Stephen N. Limbaugh
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2025-EM

Ramon Elisalde,
Appellant,

vs.

International Association of Machinists, etc., et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellees' petitions for rehearing en banc have been considered by the Court and are denied.

Judges Donald R. Ross, John R. Gibson and George G. Fagg would have granted the petitions. Judge Frank Magill recused himself.

Petition for rehearing by the panel is also denied.

August 7, 1986